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Kumpulan Darul Ehsan Bhd v Mastika Lagenda Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-88–12 OF 2015 (B)

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ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), AHMAD MAAROP, ZAHARAH IBRAHIM AND BALIA YUSOF FCJJ

11 JULY 2017

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Contract — Sale and purchase of shares — Option — Respondent entered into share sale agreement ('SSA') with appellant and paid purchase price to appellant — Completion of SSA subjected to conditions — Respondent may elect to terminate SSA if earlier agreement for purchase of shares with Tenaga Nasional Bhd ('TNB') terminated — Upon termination, appellant liable to refund purchase price — TNB terminated agreement consequently respondent exercised option and asked for refund of purchase price from appellant — Appellant failed to refund purchase price — Respondent brought action for recovery of purchase price — Whether laches and unreasonable delay applicable — Whether limitation had set in — Limitation Act 1953 s 32

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The respondent had entered into a share sale agreement ('TNB-MLSB SSA') with Tenaga Nasional Bhd ('TNB') in relation to 40% of TNB's shares in a company known as Sepang Power Sdn Bhd ('SPSD'). Subsequently, the respondent had also entered a share sale agreement with the appellant with respect to the appellant's shares in SPSD ('the SSA'). The SSA was subjected to the fulfilment of conditions precedent in cl 5 and special conditions in cl 9 of the SSA. Clause 9 of the SSA provided, inter alia, that the respondent may elect to terminate the SSA if the TNB-MLSB SSA was not completed and that the appellant shall refund the purchase price to the respondent upon the termination of the SSA. The respondent had paid the purchase price, nonetheless, the TNB-MLSB SSA was terminated. Based on the option clause, the respondent demanded the refund of the purchase price but to date, the appellant failed to pay the same. Consequently, the respondent brought an action at the High Court for recovery of the purchase price, interest and costs. The High Court dismissed the action on the ground that laches and unreasonable delay in terminating the SSA which was four years after TNB's termination but the court opined that the action was not statute-barred. On appeal, the Court of Appeal allowed the appeal and held that equity should not be invoked. The Court of Appeal further found that it was agreed in the SSA that any delay in exercising the rights therein should not constitute a waiver and thus s 32 of the Limitation Act 1953 ('the Act') did not apply. Aggrieved by the decision, the appellant filed the present appeal. The appellant submitted that the option must be exercised within a reasonable time and for the purpose

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of computing the limitation period it should be from the time when the option should have been exercised. In response, the respondent submitted that limitation period should run from the time the defendant failed to refund the purchase price after the demand was made and not from the time of TNB's termination since at that time the option was yet to be exercised.

Held, dismissing the appeal with costs:

(1) In present case there were two crucial matters agreed upon, namely, the option right and the waiver provision. As such those terms must be considered in the light of the legal principles, to wit, that the sanctity of a contract must be preserved and that it was not the function of the court to rewrite the agreed terms in the contract. Accordingly, since the plaintiff and the defendant had clearly agreed to the terms in the SSA, they should be bound by them. And since 'No failure or delay by any Party in exercising any rights hereunder or conferred by law shall operate as a waiver thereof', there was no basis to call upon equity in aid to the case of the defendant. As such, the court agreed with the Court of Appeal that in the present case laches and unreasonable delay did not arise (see paras 23–24).

(2) In the present case limitation had not set in. Indeed, the period of limitation should start to run upon the exercise of the option by the plaintiff and followed by the failure of the defendant to comply with the demand for refund of the purchase price and not from the time of TNB's termination (see para 24).

(3) The court agreed with the reasons given by the Court of Appeal on the inapplicability of s 32 of the Act in the present case (see para 25).

[Bahasa Malaysia summary

Responden telah memasuki satu perjanjian jualan saham ('TNB-MLSB SSA') dengan Tenaga Nasional Bhd ('TNB') berkaitan 40% saham TNB dalam sebah syarikat yang dikenali sebagai Sepang Power Sdn Bhd ('SPSD'). Berikutan itu, responden juga telah memasuki satu perjanjian jualan saham dengan perayu berkaitan saham perayu dalam SPSD ('SSA tersebut'). SSA tersebut tertakluk kepada pematuhan prasyarat dalam fasal 9 SSA tersebut. Fasal 9 SSA tersebut memperuntukkan, antara lain, bahawa responden boleh memilih untuk menamatkan SSA tersebut jika TNB-MLSB SSA tersebut tidak siap dan bahawa perayu hendaklah membayar balik harga belian kepada responden selepas penamatan SSA tersebut. Responden telah membayar harga belian itu, walau apa pun, TNB-MLSB SSA tersebut telah ditamatkan. Berdasarkan fasal pilihan itu, responden telah menuntut bayaran balik harga belian itu tetapi sehingga kini, perayu telah gagal membayar yang sama. Berikutan itu, responden telah memulakan tindakan di Mahkamah Tinggi untuk mendapat balik harga belian, faedah dan kos. Mahkamah Tinggi telah menolak tindakan

A itu atas alasan bahawa kelewatan yang tidak munasabah dalam menamatkan SSA tersebut iaitu empat tahun selepas penamatan TNB tetapi mahkamah berpendapat bahawa tindakan itu tidak dihalang oelh undang-undang. Atas rayuan, Mahkamah Rayuan telah membenarkan rayuan dan memutuskan bahawa ekuiti tidak patut digunakan. Mahkamah Rayuan selanjutnya
B mendapati bahawa ia telah dipersetujui dalam SSA tersebut bahawa apa-apa kelewatan dalam melaksanakan hak-haknya tidak patut membentuk suatu penepian dan oleh itu s 32 Akta Had Masa 1953 ('Akta tersebut') adalah tidak terpakai. Terkilan dengan keputusan itu, perayu telah memfailkan rayuan ini.
C Perayu berhujah bahawa pilihan itu perlu dilaksanakan dalam tempoh masa yang munasabah dan bagi tujuan pengiraan tempoh had masa ia patut bermula dari masa apabila pilihan itu patut dilaksanakan. Sebagai jawapan, responden berhujah bahawa tempoh had masa patut bermula dari masa defendan gagal membayar balik harga belian selepas tuntutan dibuat dan bukan dari masa
D penematan TNB oleh kerana pada masa itu pilihan tersebut masih belum dilaksanakan.

Diputuskan, menolak rayuan dengan kos:

E (1) Dalam kes ini terdapat dua perkara penting yang telah dipersetujui, iaitu, hak untuk membuat pilihan dan peruntukan penepian. Oleh itu terma-terma tersebut perlu dipertimbangkan berdasarkan prinsip-prinsip undang-undang, iaitu, bahawa kesucian kontrak perlu dipelihara dan bahawa ia bukan fungsi mahkamah untuk menulis semula terma-terma yang dipersetujui dalam kontrak tersebut. Sewajarnya, oleh
F kerana plaintif dan defendan jelas telah bersetuju dengan terma-terma dalam SSA tersebut, mereka patut terikat dengannya. Dan oleh kerana 'No failure or delay by any Party in exercising any rights hereunder or conferred by law shall operate as a waiver thereof', tidak ada asas memanggil untuk ekuiti membantu dalam kes defendan. Oleh itu,
G mahkamah bersetuju dengan Mahkamah Rayuan bahawa dalam kes ini tiada kelewatan yang tidak munasabah yang timbul (lihat perenggan 23–24).

(2) Dalam kes ini had masa tidak ditetapkan. Sememangnya, tempoh had
H masa patut bermula setelah melaksanakan pilihan oleh plaintif dan diikuti dengan kegagalan defendan untuk mematuhi tuntutan untuk membayar balik harga belian dan bukan dari masa penamatan TNB (lihat perenggan 24).

I (3) Mahkamah bersetuju dengan sebab yang diberikan oleh Mahkamah Rayuan berhubung s 32 Akta tersebut yang tidak terpakai dalam kes ini (lihat perenggan 25).]

Notes

For cases on option, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6854–6859.

Cases referred to

The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak [2014] 6 MLJ 153, FC (refd)

Legislation referred to

Companies Act 1965 s 162(1)
Limitation Act 1953 s 32

Appeal from: Civil Appeal No B-02(NCVC)(W)-2185–10 of 2013 (Court of Appeal, Putrajaya)

David Thomas Mathews (S Janagasutha, Tina Ann Francis and Sri Lachaman Kumar with him) (Mathews Hun Lachimanan) for the appellant.
Karen Lee (Sean Tan with her) (Wong Kian Kheong) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

PRELIMINARY

[1] In this judgment unless otherwise stated, the parties are referred to as they were in the High Court.

[2] On 1 December 2015 this court granted the defendant leave to appeal on the following three questions:

(1) whether, in the case of an OPTION which is exercisable upon the happening of a specified event (trigger event), time for limitation would only start to run upon the option being exercised and not from the occurrence of the trigger event?

(2) where no time period is specified for the exercise of an OPTION, whether non-waiver/waiver clauses would serve to preclude the courts from having the jurisdiction and power to imply that the OPTION is to be exercised within a reasonable time after the happening of the trigger event? and

(3) whether the presence of non-waiver/waiver clauses in an OPTION contract would preclude reliance on equitable defences such as laches and acquiescence altogether notwithstanding that s 32 of the Limitation Act 1953 expressly preserves its applicability?

A BACKGROUND FACTS

[3] The plaintiff is a private limited company incorporated in Malaysia whose registered address is at Level 24, Wisma Genting, 28 Jalan Sultan Ismail, 50250 Kuala Lumpur.

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[4] The defendant is a public limited company incorporated in Malaysia having its registered address at Level 16, Plaza Perangsang, Persiaran Perbandaran Shah Alam, 40000 Selangor Darul Ehsan.

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[5] By a letter of award dated 9 March 2001 Sepang Power Sdn Bhd ('SPSB'), was awarded by the Economic Planning Unit an approval to develop and operate a 710MW gas-fired combined cycle power plant in the District of Kuala Langat, Selangor Darul Ehsan ('the power plant project').

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[6] By an agreement dated 21 May 2002 ('TNB-MLSB SSA') Tenaga Nasional Bhd ('TNB') and the plaintiff, subject to certain fulfilment of relevant conditions precedent, agreed on the sale of TNB's 400,000 shares, equivalent to 40% of the issued shares in SPSB, to the plaintiff.

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[7] Subsequently the plaintiff and the defendant entered into a share sale agreement dated 9 December 2002 ('the SSA') in which the defendant agreed to sell its entire stake in SPSB which was equivalent to 300,000 shares or 30% of the issued shares in SPSB ('the sale shares') to the plaintiff.

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[8] The agreed purchase price of the sale shares was RM8.5m ('the purchase price'). The purchase price was paid to the defendant on 9 December 2002.

G **[9]** Clause 8 of the SSA specified the manner in which the SSA was to be completed by the parties. The SSA was subject to fulfilment of conditions precedent ('CP') in cl 5 and special conditions in cl 9 of the SSA.

H **[10]** For ease of reference, relevant parts of cll 9 and 19 are reproduced in verbatim:

> 9.8 Notwithstanding the Completion of the sale and purchase of the Sale Shares pursuant to this Agreement, in the event that the TNB-MLSB SPA is not completed, MLSB may elect to terminate this Agreement and the Parties agree to proceed in accordance with Clause 9.9.
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> 9.9 In the event of the situations in Clause 9.3, 9.5(b) or Clause 9.8 above arising then, mindful of Clause 13, the Parties agree to proceed as follows:
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> (a) ...

(b) if Completion has taken place and remittance of the Purchase Price made, either party may opt to terminate this Agreement and MLSB or its nominee company, as the case may be, shall return the Sale Shares to KDEB and KDEB shall refund the Purchase Price to MLSB free of interest in which case the Party opting to terminate this Agreement is understood to have opted to not proceed with this Agreement.

19.9 Waiver

No failure or delay by any Party in exercising any rights hereunder or conferred by law shall operate as a waiver thereof nor shall any single or partial exercise of any right preclude any further exercise thereof or the exercise of any other right. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies otherwise provided by law or in equity.

19.11 Non-Waiver

No exercise or failure or delay in exercise of any rights, power or remedy vested in either Party under or pursuant to this Agreement shall constitute a waiver by such Party of that or any right, power or remedy.

[11] By way of a letter dated 23 December 2004 TNB terminated the TNB-MLSB SSA ('TNB's termination').

[12] Consequently, the plaintiff, through its solicitors informed the defendant of TNB's termination and demanded for the refund of the purchase price from the defendant vide several letters dated 16 December 2008, 28 April 2009 and 22 February 2011 respectively.

[13] The defendant to date has not refunded the purchase price to the plaintiff and thus in breach of the SSA.

[14] The plaintiff therefore filed an action for recovery of the purchase price, interest and costs at the High Court in Malaya at Shah Alam.

[15] In its defence, the defendant pleaded that the plaintiff's action for recovery of the purchase price was barred by limitation and that there was unreasonable delay in filing the action. The defendant further averred that the plaintiff's cause of action accrued from the date of TNB's termination. Since the action of the plaintiff was filed on 12 May 2011 it was therefore statute-barred.

[16] The defendant further pleaded an implied term in that the plaintiff ought to have exercised its right to terminate the SSA within reasonable period of time following TNB's termination.

[17] The defendant also counterclaimed for specific performance in that the plaintiff ought to register and/or file the relevant share transfer instruments necessary to effect the transfer of the sale shares to the plaintiff and to remove the defendant as the owner of those sale shares pursuant to s 162(1) of the Companies Act 1965.

BEFORE THE HIGH COURT

[18] The learned trial judge dismissed the plaintiff's action and allowed the defendant's counterclaim with costs of RM50,000.

[19] Basically the learned trial judge dismissed the action of the plaintiff on the ground that laches and unreasonable delay in terminating the SSA which was four years after TNB's termination. The defendant was therefore unduly prejudiced. However, the learned trial judge opined that time should begin to run when the defendant failed to refund the purchase price after the demand was made on 16 December 2008. In other words, the learned trial judge ruled that the action of the plaintiff was not statute-barred.

BEFORE THE COURT OF APPEAL

[20] The plaintiff appealed to the Court of Appeal. The appeal was allowed. While the Court of Appeal agreed with the learned trial judge that the action was not statute-barred, it did not agree with the learned trial judge that equity should be invoked in considering the relationship of the parties since it was governed by the terms in the SSA. Otherwise the court would be rewriting the SSA. After all, it was agreed in the SSA that any delay in exercising the rights therein should not constitute a waiver and s 32 of the Limitation Act did not apply.

BEFORE THIS COURT

Question 1

[21] Learned counsel for the defendant submitted that in a given written contract, notwithstanding the option to exercise by one party upon the occurrence of an agreed event, such option must be exercised within a reasonable time and for the purpose of computing the limitation period it should be from the time when the option should have been exercised. To hold otherwise would create uncertainty in the contract and unjust result. It could mean that the party having the right to exercise the option could do so at any time and upon exercise would have another six years before the expiry of the limitation period.

[22] In response, learned counsel for the plaintiff submitted that limitation period should run from the time the defendant failed to refund the purchase price after the demand was made and not from the time of TNB's termination since at that time the option was yet to be exercised. Further, it was contended that limitation period should not be an issue before this court since the defendant did not appeal on that issue before the Court of Appeal.

[23] In considering Question 1 it must be taken into account what the parties agreed to in the SSA. In this case there were two crucial matters agreed upon, namely, the option right and the waiver provision. As such those terms must be considered in the light of the legal principles, to wit, that the sanctity of a contract must be preserved and that it is not the function of the court to rewrite the agreed terms in a contract (see *The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153).

[24] Accordingly, since the plaintiff and the defendant had clearly agreed to the terms in the SSA such as cll 9.8, 9.9, 19.9 and 19.11 they should be bound by them. And since 'No failure or delay by any Party in exercising any rights hereunder or conferred by law shall operate as a waiver thereof' we find no basis to call upon equity in aid to the case of the defendant. As such, we agree with the Court of Appeal that in this case laches and unreasonable delay do not arise. But on the issue of limitation, we agree with the findings of the High Court and the Court of Appeal that in this case limitation had not set in. Indeed, the period of limitation should start to run upon the exercise of the option by the plaintiff and followed by the failure of the defendant to comply with the demand for refund of the purchase price and not from the time of TNB's termination. Our answer to Question 1 is therefore in the affirmative.

Questions 2 and 3

[25] Having answered Question 1 in the affirmative, it is clear that the limitation period had not set in against the plaintiff when the action was commenced. Since the action was taken within the limitation period the issues of reasonableness in the exercise of the option or the reliance upon the defences of laches and acquiescence could not be relied upon by the defendant. As such we need not answer Questions 2 and 3. Further we agree with the reasons given by the Court of Appeal on the inapplicability of s 32 of the Limitation Act 1953 in this case.

CONCLUSION

[26] For the above reasons this appeal is dismissed with costs. Learned members of the panel have read this judgment in draft and have expressed their concurrence.

Appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar